Filed 7/19/17 P. v. Lara CA4/2
See Concurring Opinion

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. HENRY ARSENIO LARA II Defendant and Appellant.	E065029 (Super.Ct.No. INF1302723) OPINION

APPEAL from the Superior Court of Riverside County. Samuel Diaz, Jr., Judge. Affirmed.

Julie Sullwold, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Peter Quon, Jr., Anthony DaSilva, and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Henry Arsenio Lara II was found guilty of unlawfully taking or driving a vehicle (Veh. Code, § 10851, subd. (a)), a wobbler, and sentenced to prison.

He now contends that:

1. Proposition 47 applies to unlawful taking or driving of a vehicle, so that this crime is a misdemeanor unless the value of the vehicle is $950 or more; in addition:

a. There was insufficient evidence that the vehicle involved was worth $950 or more.

b. The trial court erroneously failed to instruct the jury to determine whether the vehicle involved was worth $950 or more.

2. Even assuming that Proposition 47 does not apply to unlawful taking or driving of a vehicle of its own force, it must be deemed to apply to avoid an equal protection violation.

3. Proposition 47 applies in this case, even though defendant's crime was committed before it went into effect.

We will hold that Proposition 47, as properly construed, does not apply to unlawful taking or driving of a vehicle, nor does equal protection require that it so apply. It is therefore unnecessary for us to discuss defendant's other contentions.

I

FACTUAL AND PROCEDURAL BACKGROUND

In 2013, the police stopped defendant while he was driving a Honda Civic that had been stolen about a week earlier. He was in possession of two non-Honda keys; the ignition had been tampered with so as to permit these keys to be used to start it.

In 2015, in a jury trial, defendant was found guilty of unlawfully taking or driving a vehicle. (Veh. Code, § 10851, subd. (a).) In a bifurcated proceeding, after defendant waived a jury trial, the trial court found true one prior vehicle theft-related felony conviction allegation, (Pen. Code, § 666.5, subd. (a)), one strike prior (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) and four prior prison term enhancements (Pen. Code, § 667.5, subd. (b)). Defendant was sentenced to a total of ten years in prison, along with the usual fines, fees, and miscellaneous sentencing orders.

I

PROPOSITION 47 DOES NOT APPLY TO UNLAWFUL TAKING OR DRIVING

Defendant contends that Proposition 47 applies to unlawful taking or driving a vehicle.[1]

Proposition 47, also known as the Safe Neighborhoods and Schools Act, went into effect on November 5, 2014. (*People v. Sweeney* (2016) 4 Cal.App.5th 295, 298.) In general, Proposition 47 reduced certain theft-related and drug-related offenses from

[1] This issue is presently before the California Supreme Court in *People v. Page* (2015) 241 Cal.App.4th 714, review granted January 27, 2016, S230793.

felonies (or wobblers) to misdemeanors, provided (1) the perpetrator does not have a disqualifying prior conviction, and (2) in the case of theft-related offenses, the value of the property involved is not more than $950. (Couzens & Bigelow, Proposition 47: "The Safe Neighborhoods and Schools Act" (May 2017 rev. ed.) pp. 24-28.[2])

More specifically, as relevant here, Proposition 47 enacted Penal Code section 490.2, subdivision (a), which provides: "Notwithstanding . . . any . . . provision of law defining grand theft, obtaining any property by theft where the value of the . . . property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor . . . ."

Defendant was convicted of unlawful taking or driving in violation of Vehicle Code section 10851, subdivision (a), which, as relevant here, provides: "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, . . . is guilty of a public offense . . . ." This is a wobbler, punishable as a felony or a misdemeanor in the court's discretion. (*Ibid*.; see Pen. Code, § 17, subds. (a), (b).)

Defendant contends that Proposition 47 applies to him because, although it went into effect after his crime, it was already in effect when he was tried and sentenced.[3] The

---

[2] Available at <http://www.courts.ca.gov/documents/Prop-47-Information.pdf>, as of July 18, 2017.

[3] This issue is presently before the California Supreme Court in *People v. DeHoyos* (2015) 238 Cal.App.4th 363, review granted September 30, 2015, S228230.

People dispute this contention on the merits and further respond that defendant forfeited it by failing to raise it below. We need not decide these issues. We may assume, without deciding, that Proposition 47 could apply to defendant, even though it went into effect after his crime.

Unlawful taking or driving, however, does not constitute "obtaining . . . property by theft" within the meaning of Penal Code section 490.2, subdivision (a). Theft by larceny requires a felonious taking and carrying away. (*People v. Gomez* (2008) 43 Cal.4th 249, 254-255.)[4] By contrast, unlawful taking or driving can be committed merely by driving, without any taking. (*People v. Frye* (1994) 28 Cal.App.4th 1080, 1086.) Similarly, theft requires the intent to permanently deprive (*People v. Riel* (2000) 22 Cal.4th 1153, 1205) — also known as the intent to steal. Unlawful taking or driving, however, by its terms, does not require the intent to steal; it can be committed with the intent to temporarily deprive.

Accordingly, as the Supreme Court has stated: "The offense of unlawfully taking a vehicle, defined in Vehicle Code section 10851, subdivision (a), is sometimes called 'vehicle theft.' [However, b]ecause the crime requires only the driving of a vehicle (not necessarily a taking) and an intent only to temporarily deprive the owner of the vehicle, it

---

[4] For the sake of completeness, we note that theft can also be committed by false pretenses and by embezzlement. (Pen. Code, § 484, subd. (a); see generally *People v. Gonzales* (2017) 2 Cal.5th 858, 864-866.) Suffice it to say that each of these has elements that unlawful taking or driving does not require.

is technically not a 'theft.' [Citations.]" (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034, fn. 2.)

We also note that Penal Code section 490.2, subdivision (a) applies "[n]otwithstanding . . . any . . . provision of law defining grand theft . . . ." Thus, it does not override statutes defining crimes other than grand theft. That would include Vehicle Code section 10851, subdivision (a).

Defendant claims that Proposition 47 itself states that unlawful taking or driving is a form of theft. Not so. His argument is based on Penal Code section 666, subdivision (a), which provides enhanced penalties for persons convicted of petty theft who have a theft-related prior; one of the specified priors is — and has been since 1987 (Stats. 1986, ch. 402, § 1, p. 1622) — "auto theft under Section 10851 of the Vehicle Code . . . ." Proposition 47 amended Penal Code section 666, but it did not change this language. (Prop. 47, § 10.) Defendant sees this as adopting it. However, there was no need to change it, as *Montoya* had already held that it is merely a loose description, not a technical definition. In any event, Proposition 47 merely left it on the books; it did not adopt it.

Finally, defendant argues that our interpretation leads to absurd results. As he points out, Penal Code section 487, subdivision (d)(1) provides that the theft of an automobile constitutes grand theft (grand theft auto). Penal Code section 490.2, subdivision (a) therefore applies to reduce grand theft auto to a misdemeanor when the value of the automobile is not more than $950. However, it has been said that unlawful

taking or driving is a lesser included offense of grand theft auto. (*People v. Barrick* (1982) 33 Cal.3d 115, 128 [dictum]; *People v. Buss* (1980) 102 Cal.App.3d 781, 784 [dictum]; *People v. Pater* (1968) 267 Cal.App.2d 921, 925.) Thus, when a vehicle worth not more than $950 is involved, the greater offense would be a misdemeanor, but the lesser included offense would be a wobbler.

Meanwhile, defendant also contends that he is similarly situated to persons convicted of grand theft auto, and that Proposition 47 must be deemed to apply to unlawful taking or driving a vehicle in order to avoid an equal protection violation. In our view, his absurdity argument and his equal protection argument are one and the same. We recognize the "' . . . fundamental principle of statutory construction . . . that the language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend. [Citation.]' [Citation.]" (*People v. Cook* (2015) 60 Cal.4th 922, 927.) However, the supposed absurdity on which defendant relies is that two groups that are supposedly similarly situated are being treated differently. Under standard equal protection principles, as discussed in more detail in part III, *post*, if there is a rational basis for this disparate treatment, then there is no equal protection violation. Also, in that event, we can hardly say that the disparate treatment is absurd. Accordingly, we will discuss the argument under this rubric.

For the present, we conclude that Proposition 47 does not apply to unlawful taking or driving of a vehicle.

III

EQUAL PROTECTION DOES NOT REQUIRE THAT PROPOSITION 47 APPLY TO UNLAWFUL TAKING OR DRIVING

Defendant forfeited his equal protection claim by failing to raise it below. (*People v. Alexander* (2010) 49 Cal.4th 846, 880, fn. 14.) However, we discuss it in any event because it is relevant to his statutory interpretation argument (see part II, *ante*), and also as an alternative reason for rejecting it.

"The level of judicial scrutiny brought to bear on the challenged treatment depends on the nature of the distinguishing classification. [Citation.] Unless the distinction 'touch[es] upon fundamental interests' or is based on gender, it will survive an equal protection challenge 'if the challenged classification bears a rational relationship to a legitimate state purpose.' [Citations.]" (*People v. Descano* (2016) 245 Cal.App.4th 175, 181-182.) "A criminal defendant has no vested interest '"in a specific term of imprisonment or in the designation a particular crime receives."' [Citation.]" (*People v. Turnage* (2012) 55 Cal.4th 62, 74.) "Therefore, the rational basis test is applicable to an equal protection challenge involving '"an alleged sentencing disparity."' [Citation.]" (*People v. Martinez* (2016) 5 Cal.App.5th 234, 244.)

Here, "the electorate could rationally extend misdemeanor punishment to some . . . offenses but not to others, as a means of testing whether Proposition 47 has a positive or negative impact on the criminal justice system. 'Nothing compels the state "to choose between attacking every aspect of a problem or not attacking the problem at all."

[Citation.] Far from having to "solve all related ills at once" [citation], the Legislature has "broad discretion" to proceed in an incremental and uneven manner without necessarily engaging in arbitrary and unlawful discrimination. [Citation.]' [Citation.]" (*People v. Acosta* (2015) 242 Cal.App.4th 521, 527-528.)

Assuming any more particularized justification is needed, the electorate could have intended to provide for prosecutorial discretion. Sometimes, depending on the circumstances, unlawful taking or driving may be more culpable than grand theft auto — e.g., when driving the vehicle after its original taking delays or prevents its recovery, or when the victim is particularly vulnerable. The electorate could have rationally concluded that carving out unlawful taking or driving from the scope of Proposition 47 allows for prosecutorial discretion in charging certain vehicle takings as felonies based on the defendant's overall culpability. (See *People v. Wilkinson* (2004) 33 Cal.4th 821, 838-839.)

In any event, "neither the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor's discretion in charging under one such statute and not the other, violates equal protection principles. [Citation.]" (*People v. Wilkinson, supra*, 33 Cal.4th at p. 838.) The Supreme Court has stated: "[A] car thief may not complain because he may have been subjected to imprisonment for more than 10 years for grand theft of an automobile [citations] when, under the same facts, he might have been subjected to no more than 5 years under the provisions of section 10851 of the Vehicle Code." (*People v. Romo* (1975) 14 Cal.3d 189, 197.) Here,

more than 40 years after *Romo*, the situation is reversed — the penalty under Vehicle Code section 10851 is higher than for theft of a vehicle — but the principle is the same.

Accordingly, the fact that Proposition 47 applies to grand theft auto but not to unlawful taking or driving of a vehicle does not violate equal protection.

IV

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

I concur:

McKINSTER
J.

[*People v. Lara*, E065029]

Slough, J., Concurring.

I agree with the majority's conclusion Lara's felony Vehicle Code section 10851 conviction must stand, but I write separately because I reach that conclusion by a different route. The majority affirms Lara's conviction on the ground Proposition 47 does not apply to Vehicle Code section 10851 full stop. It is my view Proposition 47 applies to Vehicle Code section 10851 when the offense is *theft*, but does not affect the prosecution's charging discretion or burden of proof when the offense is *unlawful driving*. Because the record establishes the district attorney prosecuted the case as an unlawful driving offense, I concur in affirming the judgment.

As the majority notes, the issue of whether Proposition 47 affects the prosecution's discretion to charge low-value vehicle thefts as felonies under Vehicle Code section 10851 is currently before the California Supreme Court. In *People v. Van Orden* (2017) 9 Cal.App.5th 1277, review granted June 14, 2017 (S241574) (*Van Orden*), a majority of a different panel of this court held Proposition 47 eliminates prosecutorial discretion to charge as a felony *any theft* of a vehicle worth less than $950—even when the offense is charged under Vehicle Code section 10851. (*Van Orden*, at p. 1283.) Our holding is based on the California Supreme Court's decision in *People v. Garza* (2005) 35 Cal.4th 866 (*Garza*), where the court explained some Vehicle Code section 10851 violations are for unlawful driving—based on an intent to deprive the owner of

possession only temporarily, whereas others are thefts—based on an intent to deprive the owner of possession permanently. (*Garza*, at p. 871.)

This theft/driving distinction is important in the context of Proposition 47 because Penal Code section 490.2 changed the punishment for theft. "[O]btaining any property by theft where the value of the . . . property taken does not exceed nine hundred fifty dollars ($950) *shall be considered petty theft and shall be punished as a misdemeanor*." (Pen. Code, § 490.2, subd. (a), italics added.) By its plain terms, Penal Code section 490.2 altered the way prosecutors may charge vehicle thefts by mandating that any theft of *any property* worth less than $950 be punished as petty theft. (*Van Orden*, *supra*, 9 Cal.App.5th at pp. 1287-1288.) In other words, regardless of whether the prosecution charges a defendant under Penal Code section 487 (grand theft auto) or Vehicle Code section 10851, it must prove the stolen vehicle was worth at least $950, otherwise the offense is petty theft.

The majority argues Penal Code section 490.2 has no application to Vehicle Code section 10851 because violations of that provision are not technically thefts. As support, the majority cites *People v. Montoya* (2004) 33 Cal.4th 1031 (*Montoya*), where the California Supreme Court disapproved the common practice of calling Vehicle Code section 10851 "vehicle theft" because the intent to steal is not a necessary element of the offense. (Maj. opn *ante*, p. 5, citing *Montoya* at p. 1034, fn. 2.) It is true "vehicle theft" is not a good shorthand for Vehicle Code section 10851. The provision proscribes a "wide range" of conduct—driving and theft. (*People v. Jaramillo* (1976) 16 Cal.3d 752,

757; *Garza*, *supra*, 35 Cal.4th at p. 876.) To describe it as a theft statute would certainly be a misnomer.

What *Montoya* does not say, however, is that a violation of Vehicle Code section 10851 can *never* constitute a theft. Indeed, as the California Supreme Court explained less than a year later, just the opposite is true. "[A] defendant convicted under section 10851(a) of unlawfully *taking* a vehicle with the intent to permanently deprive the owner of possession *has suffered a theft conviction*." (*Garza*, *supra*, 35 Cal.4th at p. 871, second italics added.) Thus, when the Vehicle Code section 10851 offense is based on theft, Penal Code section 490.2 applies and requires the prosecution prove the vehicle was worth $950 or more in order to secure a felony conviction. When the offense is based on driving without the owner's permission, Penal Code section 490.2 does not apply. *Van Orden* responds to the majority's other arguments regarding Penal Code section 490.2 and Vehicle Code section 10851 at some length, so I will not belabor those points here. (*Van Orden*, *supra*, 9 Cal.App.5th at pp. 1289-1295.)

Turning to Lara's claim on appeal, he asserts the prosecution was required to prove the vehicle he was driving was worth at least $950 in order to secure a felony Vehicle Code section 10851 conviction. He argues that because the prosecution presented no value evidence at trial, his conviction must be reduced to petty theft. Lara's argument fails because the prosecution charged him with unlawful driving—not theft—and proved the elements of that crime beyond a reasonable doubt. The testimony of the victim and police established Lara was arrested for driving the victim's car, several days

after she had reported it stolen. The trial court instructed the jury on the elements of unlawful driving,[5] and the jury convicted Lara of "driving a vehicle without permission." I would therefore reject Lara's claim the prosecution was required to present evidence of value and affirm the judgment on the ground Proposition 47 does not apply to unlawful driving offenses like the one here.

SLOUGH

J.

[5] The instruction on unlawful driving read: "The defendant is charged in Count 1 with unlawfully driving a vehicle in violation of Vehicle Code section 10851. To prove that the defendant is guilty of this crime, the People must prove that: (1) [t]he defendant drove someone else's vehicle without the owner's consent; AND (2) [w]hen the defendant did so, he intended to deprive the owner of possession or ownership of the vehicle for any period of time."